

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.597 of 2015

Arising Out of PS.Case No. -5 Year- 2011 Thana -INARWA District-
WESTCHAMPARAN(BETTIAH)

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1. Sona Mati Devi wife of Chhotelal Das about 35 years resident of Village- Itiyahi,
P.s Pokhari District Parsa(Nepal) Appellant/s

Versus

1. The State of Bihar Respondent/s

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Appearance :

For the Appellant/s : Mr. Baban Roy, Amicus Curiae

For the Respondent/s : Mr. S. A. Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 04-07-2017

The case has been called out but none represents the
appellant, on account thereof, Sri Baban Roy has been requested to
assist the Court as an Amicus Curiae.

2. Heard learned Amicus Curiae for the appellant as
well as learned APP.

3. Sole appellant, Sona Mati Devi has been found
guilty for an offence punishable under Sections 20(b) (ii) C, 22 C and
23 C of the NDPS Act and sentenced to undergo RI for 10 years as
well as to pay fine of Rs. 1 Lac and in default thereof, to undergo
imprisonment of 1 year additionally under each head independently
with a further direction to run the sentences concurrently, by the
Additional District and Sessions Judge-VI-cum-Special Judge, NDPS,
West Champaran, Bettiah vide his judgment of conviction dated
18.08.2012 and order of sentence dated 22.08.2015 passed in



connection with Trial No. 56/2011 arising out of Inarwa PS Case No. 05/2011.

4. Informant, a Sub-Inspector of SSB, 27th Battalion, namely, L.K. Natung filed a written report containing search report, apprehension report as well as by way of producing the appellant along with six packets of Charas weighing 3 Kilograms on 03.02.2011 at 2.45 PM before the police putting an allegation that in the morning hour, he received confidential information regarding transportation of Charas by the smugglers whereupon, they began to search with the help of female constables and during course thereof, Sona Mati Devi, appellant was also intercepted near Pillar No. 414 lying at Village-Babhnauli and from a bag, 3 Kilograms of Charas was seized on search, for which, seizure list was prepared, accused was taken into custody.

5. On the basis of the aforesaid written report, Mainatand PS Case No. 05/2011 was registered followed with investigation and after concluding the same, charge-sheet was submitted, the basis for trial which ultimately concluded by way of recording finding of guilt against the appellant for which, she has been sentenced for, subject of challenged under the present appeal.

6. The defence case as has been pleaded as well as statement recorded under Section 313 CrPC is of complete denial as



well as wrong apprehension of the appellant. However, neither any DW nor any kind of document has been brought up on record on behalf of appellant.

7. In order substantiate its case, the prosecution had examined altogether 6 PWs out of whom, PW-1, L.K. Natung, the informant, PW-2, Priyanka Kumar, a lady Constable, PW-3, Chaken Kumar Joshi, a constable of 27th Battalion, PW-4, Renu Kumari, another lady constable, PW-5, Devojit Das, another constable of 27th Battalion, and PW-6 Sridas Rai, the Investigating Officer. Side by side also exhibited Ext-1 series, signatures of witnesses over seizure list, apprehension memo, Ext-2, Signature of O/C over formal FIR , Ext-3, Endorsement over written report, Ext-4, FSL report.

8. In spite of examination of the informant as PW-1, written report has not been exhibited and the reason behind for such lapse is not at all found on record.

9. The evidence on record after proper appreciation is found classified under three categories. The first category represents the evidence of PWs, 1, 3 and 5. The second category consists of PWs-2 and 4 and the third one comprises of PW-6. The first category of evidence disclosed that the personnel of SSB had received confidential information regarding crossing of border of smuggler carrying *Charas* which was noted down, but never been brought up on



record. In likewise manner, they also happen to be silence with regard to compliance of Section 42 (2) of the NDPS Act whereunder written report and the other documents were to be placed before superior officials within 72 hours. Furthermore, it is also evident that they on their own, did not disclose that the search was made by them rather, they had narrated that the search was made by PW-2, PW-4, the lady constables.

10. Before coming to the evidence of PWs-2 and 4 falling under 2nd category cross-examination of PW-1 is to be taken note of. In para-7, he had divulged that lady constables had searched the culprit. First of all, accused was taken at Chowki. Search of bag was made at the place of occurrence. Seizure was prepared at the place of occurrence. Other female members were also present. However, at para-8, he had contradicted by way of divulging that no local inhabitants were present at the place of occurrence and so, members of the forces of his Battalion stood as seizure list witnesses. The first category of evidence, that means to say, of PWs-1, 3 and 5 have not disclosed with regard to preparation of sample, seal of seized article as well as samples and so, there happens to be complete absence at the end of the prosecution on that very score.

11. Now coming to the 2nd category of evidence consisting of PWs-2 and 4, both are lady constables, it is evident that they both



in examination-in-chief had substantiated the case of the prosecution but during course of cross-examination, PW-2 had said in para-4 that she had caught hold of the accused. In para-7, she had disclosed that she is unaware as to where the bag was opened. Then had narrated that weight of packet was done at the police station but she is not remembering whether it was sealed or not. She had also shown ignorance with regard to presence of any Magistrate for the aforesaid purpose, while PW-4 during course of her cross-examination at para-6 had stated that she was unaware whether the seized article was Charas. She had put her signature as per direction of her Saheb. Whether her Saheb had put his signature before her signature, she is unable to say. The weight of the packets was done at the police station. The packets were kept at police station. The 3rd category of the evidence relates to PW-6, the Investigating Officer. During examination-in-chief, he had stated that after entrusted with investigation of the case, he visited the place of occurrence which he narrated in detail, took statement of the witnesses, prayed for examination of the sample and then, after getting permission from the court, he sealed the sample and transmitted the same to FSL for chemical examination. Then thereafter, he submitted charge-sheet. During cross-examination at para-8, he had stated that seizure list was not prepared by him. He had seen article. He is unaware whether



seized article was sealed or not. He had not sealed the sample. He had not mentioned the fact that he has produced the sample before the Magistrate in sealed condition. Then had stated that the Magistrate himself took out the sample. Again corrected that sample was sealed in presence of Magistrate. Again corrected that seal was only that of Magistrate.

12. So, from the evidence as referred above, it is crystal clear that apart from violating the mandate of law by the witnesses of first category by not following the mandatory provision prescribed under Section 42(2) of the NDPS Act, the second category as well as third category of witnesses are also silent over proper compliance of Section 57 of the NDPS Act whereunder they have to report before the superior officials regarding apprehension of the accused as well as the articles. Furthermore, it is also evident that there happens to be complete silence at the end of prosecution with regard to preparation of sample, sealing of sample. Moreover, the seized article has not been produced in court nor its sample, nay there happens to be any kind of document to suggest that the so alleged seized Charas has been destroyed in terms of Section 52(A) of the NDPS Act.

13. Apart from this, there also happens to be failure at the end of the prosecution in substantiating the fact by cogent, reliable evidence that the seized article was kept at Thana Malkhana in sealed



condition carrying seal of SHO and from there, it was taken out on the specified date before the Magistrate and further, having proper sampling it was again sealed and deposited at Thana Malkhana.

14. In *Noor Aga* case as reported in (2008) 16 SCC 417, the aforesaid eventualities were perceived and after analyzing the same, the Hon'ble Apex Court had laid down the principle that having been stringent punishment prescribed under NDPS Act, further commands the prosecuting agency to follow the mandate of law properly failing which, the prosecution case is to be rejected outrightly.

15. In **Kishan Chand v. State of Haryana** as reported in 2013 (2) SCC 502, the Hon'ble Apex Court again reiterated the same view in followed manner which are as follows:-

“21. When there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance. It will per se amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.

22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element



of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.”

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24. Reliance placed by the learned counsel appearing for the State on the case of Sajan Abraham (supra) is entirely misplaced, firstly in view of the Constitution Bench judgment of this Court in the case of Karnail Singh (supra). Secondly, in that case the Court was also dealing with the application of the provisions of [Section 57](#) of the Act which are worded differently and have different requirements, as opposed to [Sections 42](#) and [50](#) of the Act. It is not a case where any reason has come in evidence as to why the secret information was not reduced to writing and sent to the higher officer, which is the requirement to be adhered to ‘pre-search’. The question of sending it immediately thereafter does not arise in the present case, as it is an admitted position that there is total non-compliance of [Section 42](#) of the Act. The sending of report as required under [Section 57](#) of the Act on 20th July, 2000 will be no compliance, factually and/or in the eyes of law to the provisions of [Section 42](#) of the Act. These are separate rights and protections available to an accused and their compliance has to be done in accordance with the provisions of [Sections 42, 50](#) and [57](#) of the Act. They are neither inter-linked nor inter-dependent so as to dispense compliance of one with the compliance of another. In fact, they operate in different fields and at different stages. That distinction has to be kept in mind by the courts while deciding such cases.

16. The Hon’ble Apex Court also considered the prosecution case to be deficient on account of non production of seized article as a material exhibit before the trial court as has been



laid down in the case of *Vijay Jain v. State of Madhya Pradesh* as reported in (2013) 14 SCC 527, wherein the Hon'ble Apex Court had occasion to see the impact of non production of material exhibit during course of trial and has dealt with in following way:-

9. Para 96 of the judgment of this Court in *Noor Aga case* (2008) 16 SCC 417 on which the learned counsel for the State very strongly relies is quoted hereinbelow: (SCC p. 464)

“96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.”

Thus in para 96 of the judgment in *Noor Aga case* (2008) 16 SCC 417 this Court has held that the prosecution must in any case produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Court's judgment in *Jitendra case* (2004) 10 SCC 562, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the



contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *Ashok* (2011) 5 SCC 123 this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.

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12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW 3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.”

17. Consequent thereupon, the judgment of conviction and



sentence recorded by the learned lower court does not find favour whereupon, the same is set aside.

18. Appeal is allowed. Appellant is on bail, hence is directed to be discharged from the liability of bail bond.

19. The first and the last pages of the instant judgment be handed over to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

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